

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY )	MDL NO. 1456
AVERAGE WHOLESALE PRICE )	CIVIL ACTION NO.
LITIGATION )	01-12257
)	
THIS DOCUMENT RELATES TO: )	Judge Patti B. Saris
ALL CLASS ACTIONS )	
)	

**AFFIDAVIT OF DARRELL A. H. MILLER**

I, Darrell A. H. Miller, being duly sworn, depose and state:

1. My name is Darrell A. H. Miller. I am an Ohio resident over the age of 18. I have personal knowledge of the matters set forth in this affidavit. If called to testify regarding these matters, I could competently do so.

2. I am an attorney at Vorys, Sater, Seymour and Pease LLP, located at 52 East Gay Street, P.O. Box 1008, Columbus, Ohio, 43216-1008. I am one of the attorneys representing Boehringer Ingelheim Corporation (BIC), Ben Venue Laboratories, Inc. (Ben Venue) and Ben Venue's division, Bedford Laboratories (Bedford) (hereinafter referred to as the Boehringer Defendants) in the above-titled action.

3. On or about October 21, 2005, shortly after receipt of the Third Amended Consolidated Class Action Complaint (TAMCC), I telephoned Mr. Allan Hoffman, counsel for plaintiffs, to inquire why the Boehringer Defendants had been included in the TAMCC since they had been dismissed with prejudice from the Amended Master Consolidated Class Action Complaint (AMCC) on June 9, 2004. (Follow-up October 21, 2005 letter at Ex. 1 to Affidavit)

EXHIBIT

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4. The fact that the Boehringer Defendants had been dismissed from the lawsuit was consistent with prior communications with plaintiffs' counsel where they had acknowledged that the Court's June 9, 2004 Order dismissed the Boehringer Defendants from the case. (*See Ex. 2*)

5. In response to my inquiry regarding the TAMCC, plaintiffs' counsel, Allan Hoffman responded in an email to me that the inclusion of the Boehringer Defendants in the TAMCC "may have been unintentional" but that he would consult with co-counsel who were more closely involved in drafting the TAMCC. After consulting with his co-counsel, Mr. Hoffman stated that the Boehringer Defendants were included in the TAMCC for "purposes of preserving the appellate rights of plaintiffs." (Ex. 3, October 21, 2005 Hoffman Email to Miller)

6. In another conversation, on or about October 25, 2005, Mr. Hoffman stated his belief that plaintiffs do not intend to pursue any claims against the Boehringer Defendants in this case and that the inclusion of the Boehringer Defendants in the TACC was to preserve appeal rights regarding the dismissal order. He suggested that plaintiffs would be willing to send an email to counsel for the Boehringer Defendants confirming the same.

7. I indicated to Mr. Hoffman that an email alone would not likely be adequate to protect the interests of the Boehringer Defendants. I asked Mr. Hoffman to come back to me with a specific proposal on how to resolve this issue.

8. On November 2, 2005, Mr. Hoffman sent me an e-mail stating "that plaintiffs do not intend to pursue new claims against Boehringer based on the newly added plaintiffs and will not consider Boehringer to be a party for the purposes of taking discovery in connection with the newly named plaintiffs." (Ex. 4, Nov. 2 e-mail to Miller)

9. I responded with a specific agreement, including in paragraph 5 an agreement that plaintiffs would file with the court "a statement that the claims in the amended consolidated

complaint against BIC [Boehringer Ingelheim Corporation], BVL [Ben Venue Laboratories] and Bedford were included only to preserve, if necessary, the right to appeal the June 9 order.” (Ex. 5, e-mail to Hoffman)

10. As of the filing of this Motion to Strike, plaintiffs have not committed to this agreement.

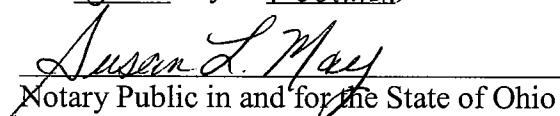
"FURTHER AFFIANT SAYETH NOT."



Darrell A. H. Miller

STATE OF OHIO )  
                    )  
COUNTY OF Franklin ) ss

Subscribed and sworn to before me  
this 3rd day of November, 2005



Susan L. May  
Notary Public in and for the State of Ohio

My Commission Expires: 02-05-07



SUSAN L. MAY  
Notary Public, State of Ohio  
My Commission Expires 02-05-07

# Vorys, Sater, Seymour and Pease LLP

52 East Gay Street • Post Office Box 1008 • Columbus, Ohio 43216-1008 • Telephone (614) 464-6400 • Facsimile (614) 464-6350 • Cable: voryssater

Arthur L. Vorys 1876-B233	WASHINGTON 1828 L Street NW Eleventh Floor Washington, D.C. 20006-5109	CLEVELAND 2100 One Cleveland Center 1375 East Ninth St. Cleveland, OH 44114-1723	CINCINNATI Suite 2000, Atrium Two 221 E. Fourth St. PO Box 0236 Cincinnati, OH 45201-0236	ALEXANDRIA 277 South Washington St. Suite 310 Alexandria, VA 22314	AKRON 100 South Main Street Suite 1100 Akron, OH 44308
Edward L. Pease 1873-B124	Tel 202-407-8800 Fax 202-407-8800	Tel 216-479-6100 Fax 216-479-6000	Tel 513-723-4000 Fax 513-723-4056	Tel 703-5817-0000 Fax 703-5817-002	Tel 330-208-1000 Fax 330-208-1001

Darrell A. H. Miller  
Direct Dial (614) 464-6328  
Facsimile (614) 719-4695  
E-Mail - dahlmiller@vssp.com

October 21, 2005

## VIA FACSIMILE AND EMAIL

Allan Hoffman, Esq.  
Hoffman & Edelson  
45 West Court Street  
Doylestown, PA 18901  
Fax: (215) 230-8735

Re: AWP MDL -- Third Amended Complaint

Dear Allan:

This is to confirm our telephone conversation today in which you stated that the inclusion of Boehringer Ingelheim Corporation and Ben Venue Laboratories, Inc./Bedford Laboratories in the Third Amended Master Consolidated Class Action Complaint was unintentional and clearly in error. You also stated that you would call your co-counsel to investigate, and call me back early next week.

As I indicated, we would like to achieve some kind of finality to ensure that these entities, which were dismissed from the class action last year, are not inadvertently included in any future pleadings. Although you indicated that you would like to avoid filing a corrected complaint, your suggestion of a stipulation with the Court may be agreeable. In an effort to achieve some final resolution, we would appreciate a chance to look over such a stipulation before it is filed.

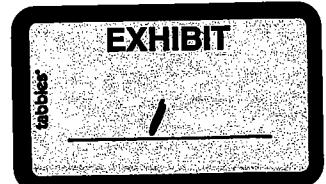
I look forward to your call early next week.

Sincerely,



Darrell A. H. Miller

EXHIBIT



**Miller, Darrell A. H.**

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**From:** Miller, Darrell A. H.  
**Sent:** Thursday, May 05, 2005 6:09 PM  
**To:** 'ahoffman@hofedlaw.com'  
**Cc:** Coval, Paul J.; Rogers, Douglas L.  
**Subject:** Boehringer Rule 30(b)(6) Deposition

Allan,

Thanks for returning my call regarding the notice of deposition. After conferring with my colleagues, in addition to the notice you sent, we are in possession of a letter dated April 20, 2005 from Sean R. Matt at Hagens Berman seeking discovery from "Track 2" defendants pursuant to CMO No. 14.

As I indicated in my phone call, our position is that the entities you seek to depose were dismissed from the AMCC pursuant to Judge Saris' electronic order of June 9, 2004. I understand that you will be investigating whether some miscommunication or misunderstanding has occurred on the plaintiff's side.

We will be preparing a more formal letter to send to both you and Matt later this week, but would like to resolve any misunderstanding well before the deposition notice date.

Darrell

Darrell A. H. Miller  
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Arthur L. Vorys 1856-BKC3 Lowry E. Sater 1867-BK35 Augustus T. Seymour 1873-BK26	WASHINGTON 1828 L Street NW Eleventh Floor Washington, D.C. 20036-5000	CLEVELAND 2000 Erie Cleveland Center 1375 East Ninth St. Cleveland, OH 44114-1724	CINCINNATI Suite 2000, Arthur Two 221 E. Fourth St. PO Box 9230 Cincinnati, OH 45201-0230	ALEXANDRIA 277 South Washington St. Suite 310 Alexandria, VA 22314	AKRON 106 South Main Street Suite 1100 Akron, OH 44308
Edward J. Pease 1873-BK24	Tel 202.467.3800 Fax 202.467.3800	Tel 216.579.6100 Fax 216.579.6080	Tel 513.723.1000 Fax 513.723.1076	Tel 703.3617.6890 Fax 703.350.4492	Tel 330.208.1000 Fax 330.208.1000

Darrell A. H. Miller  
Direct Dial (614) 464-6328  
Facsimile (614) 710-4695  
E-Mail - dahmiller@vsspc.com

May 9, 2005

### VIA FACSIMILE AND EMAIL

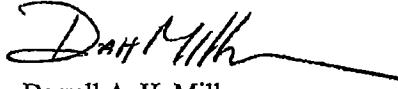
Allan M. Hoffman  
Hoffman & Edelson LLC  
45 West Court Street  
Doylestown, PA 18901  
Fax: (215) 230-8735

Re: In Re Pharmaceutical Industry AWP Litigation MDL No. 1456

Dear Allan:

Thank you for today's telephone call and for your quick response to my e-mail of May 5. This letter confirms our conversation today that the discovery and 30(b)(6) deposition notices that Plaintiffs recently sent to our clients in the above-captioned case were issued in error and should be disregarded. I also understand that I should refer further inquiries from other Plaintiffs' counsel about this matter to you for resolution.

Yours very sincerely,



Darrell A. H. Miller

DAHM/dahm

cc: Sean R. Matt, Esq.  
Paul J. Coval, Esq.

In re Pharm AWP Litigation -- 30(b)(6) Deposition Notice

Page 1 of 1

**Miller, Darrell A. H.**

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**From:** Allan Hoffman [ahoffman@hofedlaw.com]  
**Sent:** Wednesday, June 29, 2005 10:06 AM  
**To:** Miller, Darrell A. H.  
**Subject:** RE: In re Pharm AWP Litigation -- US Oncology

Darrell:

Per our most recent conversation, this is to confirm that I have informed US Oncology's counsel that Boehringer, Bedford and Ben Venue are no longer defendants in the case.

The Boehringer Group--AccessMed

Page 1 of 1

**Miller, Darrell A. H.**

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**From:** Rob Lopez [robl@hbsslaw.com]  
**Sent:** Thursday, September 08, 2005 8:38 PM  
**To:** Mark S. Gunnison  
**Cc:** Miller, Darrell A. H.  
**Subject:** The Boehringer Group--AccessMed

Mark: With regard to the subpoena that plaintiffs have served on your client, AccessMed, in the AWP litigation, please disregard any references to Boehringer Ingelheim Corp., Ben Venue Laboratories Inc., and Bedford Laboratories (collectively referenced as "The Boehringer Group") as defendants in the case. Companies collectively referenced as The Boehringer Group are no longer defendants in the case.

Thank you. --Rob

Robert F. Lopez  
Hagens Berman Sobol Shapiro LLP  
1301 Fifth Avenue, Suite 2900  
Seattle, WA 98101  
206.623.7292  
206.623.0594 (fax)

The Boehringer Group

Page 1 of 1

**Miller, Darrell A. H.**

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**From:** Rob Lopez [robl@hbsslaw.com]  
**Sent:** Thursday, September 08, 2005 8:44 PM  
**To:** Miller, Darrell A. H.  
**Cc:** ahoffman@hofedlaw.com; Carrie Flexer  
**Subject:** The Boehringer Group

Mr. Miller: I'm one of the lawyers representing plaintiffs in the AWP litigation. Allan Hoffman passed along your request that we notify recipients of plaintiffs' recent subpoena that members of The Boehringer Group are no longer defendants in this action.

As you will see, I have notified Mark Gunnison, counsel appearing for AccessMed, Inc. AccessMed is one of the recipients of plaintiffs' subpoena.

The only other entity that has responded thus far is PracticeXpert of Idaho, Inc. That entity has already produced all documents that it says are responsive to the subpoena. I have reviewed those documents, and none pertain to the Boehringer Group.

As other recipients respond, we will notify them and copy you.

Please contact me if you have any questions or comments.

--Rob Lopez

Robert F. Lopez  
Hagens Berman Sobol Shapiro LLP  
1301 Fifth Avenue, Suite 2900  
Seattle, WA 98101  
206.623.7292  
206.623.0594 (fax)

**Miller, Darrell A. H.**

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**From:** Allan Hoffman [ahoffman@hofedlaw.com]  
**Sent:** Friday, October 21, 2005 4:54 PM  
**To:** Miller, Darrell A. H.  
**Subject:** RE: AWP MDL -- Third Amended Class Action Complaint

Darrell:

I received your e-mail and attached letter from earlier today. As a preliminary matter, I believe that it is important that I clarify the record as I never said that the inclusion of your client was "unintentional and clearly in error." Rather, I stated that your client's inclusion "may have been unintentional," but that I had not been involved in the drafting of the third amended complaint relating to Boehringer and that I would have to speak to my co-counsel to learn why your client was specified in the allegations of the third amended complaint.

After speaking with my co-counsel, I have learned that Boehringer was included for purposes of preserving the appellate rights of plaintiffs. Please feel free to contact me to discuss this further should you have any questions.

-----Original Message-----

**From:** Miller, Darrell A. H. [mailto:[dahmiller@vssp.com](mailto:dahmiller@vssp.com)]  
**Sent:** Friday, October 21, 2005 1:37 PM  
**To:** [ahoffman@hofedlaw.com](mailto:ahoffman@hofedlaw.com)  
**Subject:** AWP MDL -- Third Amended Class Action Complaint

From the law offices of Vorys, Sater, Seymour and Pease LLP.

ANY FEDERAL TAX ADVICE CONTAINED IN THE FOREGOING IS NOT INTENDED OR WRITTEN BY THE PREPARER OF SUCH ADVICE TO BE USED, AND IT CANNOT BE USED BY THE RECIPIENT, FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON THE RECIPIENT. THIS DISCLOSURE IS INTENDED TO SATISFY U.S. TREASURY DEPARTMENT REGULATIONS.

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**Miller, Darrell A. H.**

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**From:** Allan Hoffman [ahoffman@hofedlaw.com]  
**Sent:** Wednesday, November 02, 2005 2:31 PM  
**To:** Miller, Darrell A. H.  
**Subject:** RE: AWP MDL -- Third Amended Class Action Complaint

Darrell:

In light of our recent conversations, I am writing to address your concerns with regard to the inclusion of the Boehringer Group ("Boehringer") in the Third Amended Complaint ("TAC").

As I have explained previously, Boehringer was included in the TAC for purposes of preserving the appellate rights of plaintiffs. It is my understanding that you have two chief concerns with Boehringer's inclusion, namely that: (i) plaintiffs may be pursuing new claims against Boehringer through newly added plaintiffs; and (ii) plaintiffs may treat Boehringer as a party with respect to discovery.

Therefore, please note that plaintiffs do not intend to pursue new claims against Boehringer based on the newly added plaintiffs and will not consider Boehringer to be a party for the purposes of taking discovery in connection with the newly named plaintiffs.

I hope that this adequately addresses your concerns.

Please feel free to contact me if you have any questions.



**Miller, Darrell A. H.**

---

**From:** Miller, Darrell A. H.  
**Sent:** Wednesday, November 02, 2005 4:38 PM  
**To:** 'Allan Hoffman'  
**Subject:** RE: AWP MDL -- Third Amended Class Action Complaint

Allen,

Thank you for your e-mail and for your assurances in the third paragraph. Are you saying:

1. That Plaintiffs concede that Boehringer Ingelheim Corporation, Ben Venue Laboratories, and Bedford Laboratories were dismissed with prejudice from the consolidated class action on June 9, 2004;

2. That Plaintiffs agree that they will not pursue either old or new claims against Boehringer Ingelheim Corporation, Ben Venue Laboratories, or Bedford Laboratories pursuant to any version of the consolidated class action complaint;

3. That Plaintiffs agree that they will not pursue discovery against Boehringer Ingelheim Corporation, Ben Venue Laboratories, or Bedford Laboratories in the consolidated class action complaint;

4. That none of the foregoing shall be considered a waiver of Plaintiffs' right to appeal Judge Saris' June 9, 2004 Order of dismissal;

And

5. Plaintiffs will file with the Court a statement that the claims in the amended consolidated complaint against BIC, BVL, and Bedford were included only to preserve, if necessary, the right to appeal the June 9 Order.

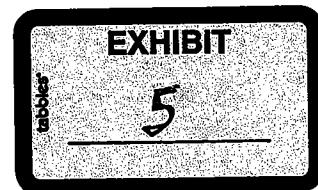
If on behalf of the plaintiffs you agree with 1-5 above, on reliance on that agreement we will not file a Motion to Strike.

As I mentioned on the phone, we need a response by 9:00am eastern time tomorrow.

Darrell A. H. Miller  
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P.O. Box 1008  
Columbus, Ohio 43216-1008  
(614) 464-6328  
(614) 719-4695 FAX  
dahmiller@vsssp.com

-----Original Message-----

From: Allan Hoffman [mailto:[ahoffman@hofedlaw.com](mailto:ahoffman@hofedlaw.com)]  
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preserving the appellate rights of plaintiffs. It is my understanding that you have two chief concerns with Boehringer's inclusion, namely that: (i) plaintiffs may be pursuing new claims against Boehringer through newly added plaintiffs; and (ii) plaintiffs may treat Boehringer as a party with respect to discovery.

Therefore, please note that plaintiffs do not intend to pursue new claims against Boehringer based on the newly added plaintiffs and will not consider Boehringer to be a party for the purposes of taking discovery in connection with the newly named plaintiffs.

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